No. 15442

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

The National Life and Accident Insurance Company,

Appellant,

vs.

Verda A. Gorey,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellant, The National Life and Accident Insurance Company, replies to appellee's brief herein as follows:

ARGUMENT.

I.

The Uncontradicted Evidence Established Appellant's Defenses of Misrepresentation and Concealment. Appellant Was Entitled to a Directed Verdict and to an Order Setting Aside the Verdict and Judgment.

The arrangement of appellee's arguments in her brief is such as to require a consolidation herein for the purpose of replying thereto. Appellee's contentions that there was a conflict in the evidence relating to appellant's defenses of misrepresentation and concealment are answered under the above point.

1. There Is No Conflict in the Evidence and the Evidence Establishes Without Contradiction That the Insured Had Had a Heart Disease Before He Signed the Written Application.

Appellee, on pages 15 and 16 of her reply brief, attempts to reply to appellant's Point I(b) in its opening brief summarizing all of the evidence conclusively establishing that the insured had coronary arteriosclerosis, a heart disease, for several months prior to and at the time he signed the application. Appellee's sole contention in that regard is that the medical examiners report [Ex. A-1] showed Mr. Gorey "to be in good health and nothing wrong with his heart." The report merely shows that the medical examiner examined the insured on April 20, 1954, and that in regard to the insured's heart the examiner found "the heart's action uniform, free and steady, and the sounds and rhythm regular and normal" (answer 8D) and that in answer to question 8E "Does physical examination reveal anything abnormal in the condition or functions of the heart or blood vessels?" the examiner's answer was "No." We submit that the report does not show that there was nothing wrong with the insured's heart but merely shows the obvious fact that the examiner, on April 20, 1954, found the insured's heart action to be "free and steady, etc." and nothing "abnormal in the conditions or functions of the heart or blood vessels" by a physical examination of the insured's chest.

Furthermore, appellee makes this contention with respect to her claim that the insured's answers in the application regarding heart disease were not false, viz, on the question of false representation and concealment. Question 54B in the application was as to whether the insured

had "ever had any ailment or disease of the heart," referring to any time prior to the date of the application (April 14, 1954). Even if it were to be assumed, for argument, that the failure of the medical examiner to find any indication of heart disease on April 20, 1954 is evidence that he then had no heart disease (which is not conceded), that circumstance is not evidence that the insured had never had any ailment or disease of the heart.

Appellant refers to its summary of the evidence on this question under Point I(b), appellant's opening brief (pp. 17-21), showing that the evidence was uncontradicted that the insured *had* an ailment or disease of the heart in October, 1953, some five months before the date of the application and the medical examination by appellant's medical examiner. We do not repeat the summary but invite the Court's attention to the record if there be any question on this matter. We point out, however, that appellee in her brief quotes a portion of Dr. Kerchner's testimony only. His diagnosis of the insured's condition in October, 1953 was not just "coronary insufficiency" as appellee implies in her brief, page 15. The testimony was that the doctor first "made a tentative diagnosis of coronary insufficiency, coronary heart disease" [R. 52], and that later, after consulting with Dr. Windsor, he made a final diagnosis of "coronary heart disease" [R. 55] "coronary artery disease—coronary arteriosclerosis" [R. 56]. And the insured did not consult Dr. Kerchner, Sr. on but one occasion as appellee states (Br. p. 15) but rather on three occasions with reference to his heart condition [R. 49].

Another matter should be noted in connection with this point. The medical examiner's report [Ex. A-1], which was on the reverse side of the written application [Ex. A], shows that the medical examiner verified the insured's answers to Part IV of the application. Part IV of the application, question 54B, asks whether the insured had ever had any ailment or disease of the heart, to which the insured answered "No," and question 60 asks for the insured's statement of the names and addresses of physicians the insured had ever consulted, to which the insured answered "None." By stating in the report that he had verified these answers the medical examiner thereby reported that he had asked the insured as to such questions and answers given in the application and that the insured gave the same answers. Since the medical examiner's report, question and answer 8F, also shows that the insured reported to the examiner that he had never undergone an electrocardiogram, it is clear that the insured misrepresented his medical history to the medical examiner, making it difficult or impossible for the examiner to make any proper diagnosis as to the condition of the insured's heart. Dr. Kerchner's testimony shows that it is necessary for a physician to have the correct medical history as well as an electrocardiogram in order to make an accurate diagnosis of coronary heart disease [R. 61]. This is another reason why appellee may not rely on the medical examiner's report as evidence that the insured had never had a heart disease.

II.

The Evidence Is Uncontradicted That the Insured Knew at the Time He Signed the Written Application on April 14, 1954, That He Had an Ailment or Disease of the Heart in October, 1953.

Appellee, at pages 19-20 of her brief, contends that there is evidence to support a finding that the insured was not aware that he had a heart ailment or disease, quoting a portion of Dr. Kerchner's testimony. While Dr. Kerchner testified that he could not remember the exact words by which he told the insured that he had a heart disease in October, 1953 and that he told the insured that his condition was not too far advanced [R. 60], there is no question whatsoever that the doctor in October, 1953 told the insured that he had coronary heart disease—coronary artery disease. Dr. Kerchner testified as follows [R. 59]:

> "Q. And when you advised Mr. Gorey as to his physical condition, especially concerning his heart, did you tell him in lay terms or did you tell him in medical terms what was wrong with him? A. I told him in lay terms. I am certain of that."

Dr. Kerchner also testified that in October, 1953 he advised the insured "to stop smoking and reduction of exercise" [R. 59], and that ". . . I explained to him that he did have this trouble and prescribed for him a regime of lighter work, less forceful exercise, discontinuing smoking and overeating perhaps, anything that might produce increased rate of the heart which would likely bring on the pain that he experienced . . ." [R. 55]; also, that he gave the insured a prescription for nitroglycerin tablets to take for the pain and advised him to come in for another electrocardiogram in six months

[R. 56-57]. There is just no evidence whatsoever showing or tending to show that the insured did not know in April, 1954 that he had coronary heart disease in October, 1953, nor is there any evidence from which such an inference could be drawn.

Appellee in her brief, page 20, quotes from *Stipcich v. Metropolitan Life Ins. Co.,* 277 U. S. 311, 72 L. Ed. 895, 48 S. Ct. Rep. 512, on the point that an applicant for insurance is charged only with disclosing to the insurer conditions affecting the risk of which he is aware, and of course this is not disputed. In passing it will be noted that in the *Stipcich* case the Supreme Court merely held that evidence offered by the beneficiary to the effect that the insured communicated to the agent for the insurer the fact that after making the application the insured consulted two physicians regarding an ulcer should have been received by the trial court. The Supreme Court also stated that if the evidence had shown that the insured had made a positive misrepresentation regarding a visit to a physician *before* applying for insurance the court would have affirmed the circuit and trial court's judgment for the insurer.

III.

The Evidence Is Uncontradicted That the Cause of Insured's Death Was Coronary Arteriosclerosis.

In its opening brief, pages 25-26, appellent cited the uncontradicted evidence showing that the insured died of coronary arteriosclerosis with reference to its separate defense that the insured was not in good health when the policy was delivered to him. While pertinent to that separate defense, the cause of the insured's death is not a

necessary element of the separate defenses of misrepresentation and concealment as to medical history in the written application or of misrepresentation and concealment in the application as to prior consultations with physicians. The law is clear that it is immaterial if the insured's condition misrepresented to or concealed from the insurer by the insured had no connection with the insured's death or did not shorten his life. The misrepresentation or concealment avoids the policy regardless. *McEwen v. New York Life Insurance Co.,* 42 Cal. App. 133, 183 Pac. 373; *Madsen v. Maryland Casualty Co.,* 168 Cal. 204, 142 Pac. 51; *Parrish v. Acacia Mutual Life Ins. Co.,* 92 Fed. Supp. 300, *aff'd* 184 F. 2d 185 (9th Cir. 1950). Of course where the evidence does show, as it does here, that the insured did die of the very condition he misrepresented or concealed, the materiality of the misrepresentation or concealment becomes self evident, although such proof be unnecessary.

IV.

Appellant Is Not Estopped to Assert Its Defenses of Misrepresentation or Concealment.

There was no question or issue of estoppel raised in the pleadings of either party, nor was it mentioned in pre-trial or in any pre-trial stipulations or other pre-trial papers. No instructions were requested or given on any such question or issue and there was no evidence offered or received which could tend to establish any estoppel. It was certainly not incumbent on the appellant to raise or present any such issue or to present any evidence to combat any such mythical matter. On the contrary it was the appellee's burden to raise such an issue by pleading

and by evidence in the trial court if she desired to present any such point and she may not, under these circumstances, properly make any such contention on appeal (Rule 8(c), F.R.C.P.).

Even if such an issue had been raised, there is no evidence whatsoever which tends to show or from which an inference may be drawn that the agent who took the insured's written application for insurance was given any information by the insured relative to his medical history or any other matter other than the insured's answers given by him in the written application. Nor is there any evidence whatsoever showing any mistake or that the agent was negligent or that he mislead the insured or in any way represented to him that he was not required to truthfully answer all questions set forth in the written application.

In support of her claim of estoppel the appellee relies on the evidence to the effect that it was the procedure of appellant for the agent taking an application for insurance to ask the questions in the application of the insured and for the agent to write down on the application form the answers given by the insured, and for the agent then to request the applicant to review the questions answered and if found correct, to sign the application, and that the answers of the insured on the written application are in the agent's handwriting [R. 76-77]. From this evidence and from the fact that the agent was not called as a witness by appellant the appellee argues that the jury "could have felt" that through fraud, mistake or negligence of the agent that the insured believed he was making truthful answers to all questions (Appellee's Br., p. 18).

As above pointed out, no burden was cast on the appellant to present any such issue. Since appellee did not, it certainly was not incumbent upon appellant to call Mr. Haws, the agent who took the insured's application. Agent Haws' employment with the appellant terminated in November, 1954 and his address in Utah was supplied to appellee in June, 1956, by the answers to interrogatories by Mr. Stevenson, appellant's president [R. 97]. Appellee made no effort to obtain or present any testimony of former agent Haws and since she had the burden on any such matter she cannot on appeal successfully contend that the appellant had any duty to present testimony by Haws.

Appellee refers to the case of *Boggio v. California-Western States Life Ins. Co.,* 108 Cal. App. 2d 597, 239 P. 2d 144, but that case is inapplicable here since the facts there were entirely different. In the *Boggio* case the evidence showed, and the trial court found, that the insurer's agent who took the insured's application for insurance was given a *truthful* statement of the facts as to the insured's prior medical history by the insured and that the agent falsely represented to the insured that the questions in the application did not require or call for information as to certain injuries the insured had received in the service. The Court then also found that the agent's misrepresentations were believed and relied upon by the insured in failing to include the information in his answers on the application, and that the insured acted reasonably in doing so. That was an entirely different situation from the case at bar. Here there was no evidence whatsoever to establish any such acts by the agent Haws, nor

may any such acts be inferred from the evidence. In the absence of such evidence it must be presumed that the agent acted in good faith. (*Maggini v. West Coast Life Ins. Co.,* 136 Cal. App. 472, 476, 29 P. 2d 63.)

In her brief, pages 20-21, appellee attempts to escape from the effect of the insured's false representation and concealment as to his prior consultations with Dr. Kerchner for diagnosis and treatment of his coronary heart disease by making the bald and unsupported statement that agent Haws "could have told the insured that the company was not interested in this type of sickness, and could have represented to the insured through fraud, negligence or mistake that a 'none' answer would be correct and truthful." This contention has absolutely no basis or merit, should require no answer, but in any event is answered by appellant's comments hereinabove made. Appellee's quotation (Br. p. 21) of a portion of the trial judge's remarks or colloquy with counsel, on argument for motion for a directed verdict, has no place in a brief on appeal. In any event appellant urges that the trial judge's quoted remarks were erroneous then and are no more meritorious now than they were when made.

Appellee cites as authority the case of *Aetna Life Ins. Co. v. Hub, etc.,* 170 F. 2d 547. The facts of that case do not remotely resemble those of this case. That case involved Massachusetts law, which differs from California law on the point. The Massachusetts law is that a misrepresentation as to prior consultation with a physician and as to prior medical history does not avoid a policy issued in reliance thereon unless made with actual intent to deceive or unless it increased the risk of loss. In that

case the facts relied on by the insurer to cancel the policy were that the insured had had an attack of "chills" for which he had consulted a physician *after* making application for the policy and before it was issued, and that the insured had not reported such consultation to the insurer. It appeared that the physician had made a diagnosis of "no disease" and that the insured was discharged as "well"; also, that the insurer conceded that representations as to past health did not cover a temporary or minor ailment such as a cold. The court there stated that assuming that a failure to report the consultation with the doctor for the chill between the date of application and delivery of the policy was tantamount to a false statement in the application, it could not be said that it amounted to a misrepresentation of a material fact made with actual intent to deceive or to a misrepresentation of a matter increasing the risk of loss. In the case at bar there was uncontradicted evidence of a misrepresentation and concealment in the written application of the three previous consultations by Mr. Gorey with Dr. Kerchner for severe pain in the heart region, the diagnosis by the doctor of coronary heart disease—coronary arteriosclerosis, an extremely dangerous and deadly disease, and of the doctor's advice to the insured that he had the heart disease. As pointed out in appellant's opening brief the misrepresentations and concealments were unquestionably material to the risk. With such evidence in the record the beneficiary cannot escape the consequences of the insured's deception by attempting to raise a new and false issue of estoppel on appeal or by attempting to becloud the issues with other inapplicable matters.

V.

The Evidence Is Uncontradicted That the Insured Misrepresented to and Concealed From Appellant That He Had Undergone an Electrocardiogram.

Appellant, in its opening brief, pages 21-22, pointed out the uncontradicted evidence establishing its separate and additional defense based on the insured's misrepresentation and concealment of the prior electrocardiogram. This defense is distinct from and is not a necessary element of its separate defenses of (a) misrepresentation and concealment as to the prior medical history of heart disease, or (b) misrepresentation and concealment as to the previous consultations with Dr. Kerchner. Nevertheless, the defense based on the electrocardiogram is sufficient in itself to avoid the policy. Since appellee stipulated that it was an unadmitted fact not to be contested that in October, 1953 the insured was examined by Dr. Kerchner and that the doctor had him undergo an electrocardiogram [R. 15-16], and since Dr. Kerchner's testimony stands uncontradicted that the insured did have an electrocardiogram taken in October, 1953, and since the medical examiner's report is in evidence without objection and speaks for itself, there was no occasion for appellant to call the medical examiner. It must be presumed that he acted in good faith.

As to the applicability here of Insurance Code, Section 10113, cited by appellee, it is true that a copy of the medical examiner's report was not attached to the policy when it was delivered to the insured. It is admitted that a photostatic copy of the application itself was attached to the policy when delivered, so that Section 10113 can have no bearing on the misrepresentations made in the

application. If the misrepresentation and concealment respecting the electrocardiogram did not amount to fraud appellee would no doubt be correct in maintaining that the unattached medical examiner's report could not avoid the policy. However, it will be noted that Section 10113 merely states that an unattached writing is not part of the contract. Failure to attach a writing to the policy does not prohibit the unattached writing from being used as competent evidence of fraud inducing the issuance of a policy and the decided weight of authority where similar statutes were construed makes such a distinction. (Ann. 93 A. L. R. 374, at p. 379.) Certainly there is strong evidence of fraud in this case. Furthermore, appellee admitted that appellant relied upon the medical examiner's report in issuing and delivering the policy [R. 15].

VI.

The Defense of Absence of Good Health When the Policy Was Issued.

In its opening brief, pages 25-26, the appellant summarized the uncontradicted evidence that the insured was not in "good health" when the policy was issued and delivered, which was a distinct and separate defense. Appellee cites *Brubaker v. Beneficial etc. Ins. Co.,* 130 Cal. App. 2d 340, 278 P. 2d 966, as authority that California has adopted a more liberal rule than Massachusetts with respect to the effect of such policy provisions. While that appears to be the case, the *Brubaker* case does not govern the facts of this case. There it appeared, and the trial court found, that the insured's statements in the application that he was in good health were made in good faith so far as he then knew. Also, the

medical examiner for the company in that case was also the insured's personal physician and had previously examined him for a complaint and had diagnosed his condition as acute gastroenteritis. When the doctor again examined him for the insurance he reported to the insurer that the applicant was "quite healthy." After the policy was issued an operation disclosed cancer. In *Brubaker,* the court expressly distinguished the fraud, deceit and misrepresentation cases and held that such cases were not controlling under the facts there, as the insured had acted in good faith and without any knowledge of the cancerous condition.

Here the evidence of misrepresentation, concealment and deceit by the insured in agreeing and representing in the written application that he was in good health is overwhelming and not contradicted. Beyond question he was not in good health when he executed the application or when the policy was delivered to him, and he knew it.

VII.
The Instructions.

Appellee passes off appellant's specifications of error in regard to the instructions given and refused, by the bald and unsupported statement that the objections are without merit. If appellant's objections to the instructions are without merit it would seem that the appellee might find some authority to support her statement. Appellee cites no such authority because there is none. Appellee does refer to the instruction covered by appellant's specification of error number (4). In addition to appellant's comments in its opening brief on this subject, it should be noted that even if it were to be conceded that Dr. Kerch-

ner gave some expert testimony or that Dr. Windsor's report were to be considered in that category, the instruction in question was erroneous. The California law does not appear to support such an instruction even where there is expert testimony. Where laymen have no knowledge of the subject they are not at liberty to reject expert opinion testimony in a civil case. See *Pearson v. Crabtree,* 70 Cal. App. 52, 232 Pac. 715, where an instruction to the effect that the jury might entirely disregard expert testimony was disapproved and judgment reversed on that ground.

Conclusion.

Appellant is entitled to reversal of the judgment and direction for entry of judgment in its favor since there was insufficient evidence to entitle the case to be submitted to the jury as a matter of law. A case cannot be submitted to a jury upon speculation. Furthermore, prejudicial error was committed as to the specified instructions objected to and as to those requested but refused.

Respectfully submitted,

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